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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1083

M. C. MANUFACTURING CO., INC., AND
UNIVERSAL AUTOMATIC MACHINE CO., INC.
Petitioners,

v.

TEXAS FOUNDRIES, INC., AND H/R PRODUCTS, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The

Supreme Court of the United States

October Term, 1975

No. 75-1083

M. C. Manufacturing Co., Inc., and
Universal Automatic Machine Co., Inc.
Petitioners,

v.

Texas Foundries, Inc., and H/R Products, Inc.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, Texas Foundries, Inc. and H/R Products, Inc. (hereinafter referred to as "Texas Foundries" and "H/R", respectively), respectfully submit this their Brief in Opposition to Petitioners' Petition for Writ of Certiorari and respectfully pray that the Court deny issuance of the writ.

OPINIONS BELOW

Respondents admit that Petitioners' references to the opinions of the courts below are correctly stated.

JURISDICTION

Respondents admit that the Court has discretionary jurisdiction to grant the writ under 28 U.S.C. § 1254(1), but Respondents deny that there are any "special and important reasons," as required by Rule 19(1) of the Rules of the Supreme Court of the United States, for issuing a writ in this case.

QUESTIONS PRESENTED

Respondents admit that Petitioners present one question arising under the Sherman Act and one question arising under the Robinson-Patman Act. Respondents entirely disagree with Petitioners' characterizations of the nature of those questions, however, and here restate the issues raised. In addition, if the Court should issue its writ in this case, Respondents will assert by cross-point fourteen other questions that were presented to, but which were not decided by, the Court of Appeals.

The Sherman Act Question

Respondents agree that the Court of Appeals held that Petitioners failed to prove the *fact* of injury (as distinguished from the *amount* of injury) resulting from an alleged violation of Section 1 of the Sherman Act. Petitioners misconceive the basis for that holding when they suggest that the court below concluded that the allegedly discriminatory price from Texas Foundries to H/R could not be considered at all in testing the fact of damage. In fact, the Court of Appeals squarely ruled that when a Sherman Act violation is alleged to have resulted from the granting of a special, discriminatorily low price to one of plaintiff's competitors, the fact of injury is not tested by hypothesizing what plaintiff's situation would have been if it too had received an illegal and discriminatory price but should instead be tested by determining what plaintiff's position would have been had the discriminatory price not been granted to one of its competitors. Thus, the first question is as follows:

1. Did the Court of Appeals correctly conclude that Petitioners failed to establish the fact of injury where,

   (a) the evidence shows that Universal would have been in no better a position had Texas Foundries not extended the "discriminatory price" to H/R, and

(b) the record evidence conclusively establishes that the second-low bidder's bid "stood between Universal and the opportunity to acquire this contract"?[1]

The Robinson-Patman Act Question

Petitioners statement of this issue does not reflect the actual basis of the decision of the Court of Appeals. As one major basis for its decision, the Court of Appeals held that the Government's selection of single producers under each of the contracts in question "precluded the possibility of competition between these suppliers as a matter of law."[2] Thus, the Court of Appeals found as a matter of fact and of law that the parties were not in competition (for Robinson-Patman Act purposes), and the second question presented is therefore as follows:

2. Did the Court of Appeals correctly conclude that Petitioners failed to establish a Robinson-Patman Act violation where the two "purchasers" in question were not competing, and could not compete, in *supplying* the same government contract (as opposed to bidding for the same contract)?

Respondents' Questions Pretermitted by the Court of Appeals

If a writ of certiorari should issue in this case, Respondents will present to the Court each of the following points, which were presented to the Court of Appeals and which were expressly pretermitted by that court. Each of these points provides an alternative ground justifying the result reached by the Court of Appeals and they are here merely listed without discussion:

1. Did the trial court err in submitting this case to the jury and in allowing the jury's verdict to stand

[1] Opinion below, 517 F.2d 1059, 1064; Petitioners' Appendix at 5.
[2] *Id.*, 517 F.2d at 1066-67; Petitioners' Appendix at 7.

because the record contains no evidence sufficient to support a finding that Respondents entered the alleged agreement in November 1971?

—. Did the trial court err in submitting this case to the jury and in allowing the jury's verdict to stand because the record does not support findings of the existence of all elements necessary to the anti-trust violation alleged:

2. *Two purchases:* Does a price quotation to one company followed by a sale to another company satisfy the "two purchases rule"?

3. *Contemporaneous sales:* Does making deliveries under a contract made with one company on November 12, 1971 at the time of entering another contract with a different company on January 17, 1972, satisfy the "contemporaneous sales" requirement?

4. *Like grade and quality:* Are raw castings of Type "G" lifting plugs with the gate stubs left on of "like grade and quality" as castings with gate stubs ground off?

5. *Substantial effect on competition:* Does this record contain evidence sufficient to support a finding that the effect of Respondents' dealings would substantially "lessen competition"? [*indirectly decided by the Court of Appeals*]

6. *Knowing inducement or receipt*: Does this record contain evidence sufficient to support a finding that H/R knowingly "induced or received a discrimination in price"?

7. In regard to Respondents' point 3, did the trial court err in allowing witness Childress to testify that Universal "purchased" from Texas Foundries on the date of delivery rather than on the date of contracting?

—. Did the trial court err in submitting this case to the jury and in allowing the jury's verdict to stand because the record conclusively establishes the existence of statutory defenses:

8. *Meeting competition*: Does the record conclusively establish that Texas Foundries' price to H/R was "made in good faith to meet an equally low price of a competitor"?

9. *Changed market conditions:* Does the record conclusively establish that Texas Foundries price to H/R was "in response to changing conditions affecting the market for or the marketability of the goods concerned"?

10. Did the trial court err in submitting the damages issue to the jury and in allowing the jury's verdict to stand because the record contains no evidence to support a finding on damages that is not wholly speculative and conjectural?

11. In regard to Respondents' point 10, did the trial court err in allowing witness Childress to testify that Universal made a profit on the sale of finished lifting plugs?

12. In regard to Respondents' point 10, did the trial court err in admitting into evidence Petitioners' exhibits 96, 97, 98, and 99?

13. Is the award of damages in this case excessive?

14. Did the trial court err and deny Respondents their right to a jury trial by delivering an impermissible "Allen charge" to the jury?

STATUTES INVOLVED

Respondents admit that Petitioners correctly cite and reproduce the relevant provisions of Section 1 of the Sherman Act and Section 4 of the Clayton Act. The Petition contains an apparent typographical error as to the citation of the Robinson-Patman Act, however, and fails to reproduce all the relevant portions of that statute. The relevant portions are Sections 2(a), (b) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (b) and (f), which provide in pertinent part as follows:

"(a) It shall be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . *Provided* . . . That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * *

"(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

STATEMENT OF THE CASE

Respondents agree that the facts of the case are accurately set forth in the opinion of the Court of Appeals. As

discussed below, Petitioners' challenge to those facts is *dehors* the record and is thus not before the Court.[3]

REASONS FOR DENYING THE WRIT

First and foremost among the many reasons for this Honorable Court's declining to exercise its discretionary power to issue a writ of certiorari is the clear fact that the United States Court of Appeals for the Fifth Circuit has already reviewed the 2,668 pages of the record on appeal,[4] thoroughly analyzed the complex maze of facts contained therein, and reached the correct, just and proper result under both settled case law and the facts.

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[3] Because of Petitioners' submission of the Rutherford Affidavit, which is not in the Record on Appeal from the trial court, Respondents conditionally offered counter-affidavits to the Court of Appeals and asked that the same be considered only in the event that the Rutherford Affidavit was accepted for any purpose. Such counter-affidavits are attached hereto as the Appendix.

The Court of Appeals rendered its opinion on August 21, 1975. Thereafter and in connection with their filing of a Motion for Rehearing, Petitioners tendered to the Court of Appeals the Affidavit of Pat Rutherford, which is reproduced at pages 15 to 16 of the Petition. The Rutherford Affidavit was dated September 9, 1975, and purported to refute the factual recitations of the lower court's opinion. On September 24, 1975, the Court of Appeals ordered Respondents to reply to the first of Petitioners' points in its Motion for Rehearing, which point was founded directly upon the Rutherford Affidavit.

In their Reply to the Motion for Rehearing, Petitioners recognized and cited the long line of uniform holdings of the Courts of Appeal that affidavits outside the record are not before a reviewing court. Because the Court of Appeals called for a reply to Petitioners' argument regarding the Rutherford Affidavit, however, Respondents conditionally tendered to the court the affidavits of James R. Cornelius, Jr., and Edward Janowski, the Government's Contracting Officer on the very contract in question. Petitioners' Motion for Rehearing was denied without opinion on November 12, 1975.

[4] The Bill of Costs in the Court of Appeals demonstrates that this record, excluding the briefs of counsel, consists of 1019 pages of the Record of Proceedings, 1133 pages of the Printed Appendix, and 516 pages of documentary exhibits.

The Sherman Act Question

The opinion of the Court of Appeals does not, as represented by Petitioners, hold that the jury was "justified in finding a violation of Section 1 of the Sherman Act".[5] To the contrary, the court below expressly stated that it was *assuming* for purposes of its opinion that a violation had been shown:

> "If plaintiffs [Petitioners'] theory of the case and version of the evidence were accepted by the jury as they *may* have been, then a Sherman Act violation has been established. *We assume arguendo* that the jury verdict was based on this premise that it was supported by the evidence."[6] (emphasis added)

The court below then ruled that even if a Sherman Act violation is established (step one), an antitrust plaintiff must also establish that the violation proximately caused injury to plaintiff's business (step two) and give some indication of the amount of those damages (step three). The court squarely held, in its opinion by Judge Clark, that it was Petitioners' failure to satisfy the second step — not the third — that led to the result reached.[7] Petitioners utterly misconceive the court's holding when they attempt to challenge the holding below by relying upon those cases supporting the settled principle that assumptions of a lesser evidentiary certainty are justified on the third step of the antitrust plaintiff's journey. Neither the Court of Appeals nor Respondents disagree that lighter proof can satisfy the third step, but the law has never been that the second step can be satisfied by less than the usual standards of proof or by the "assumptions" in which Petitioners would have the courts indulge.

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[5] Petition at 5.

[6] Opinion below, 517 F.2d at 1063, Petitioners' Appendix at 4.

[7] *Id.*, 517 F.2d at 1064, Petitioners' Appendix at 4-5.

The Court of Appeals correctly held that when the alleged violation is accomplished by the granting of a single, conspiratorially low and discriminatory price to one of the plaintiff's competitors, which price is below the usual and prevailing price of the marketplace, the "but for" test of causation is applied, and that this test requires a determination to be made of what the position of the parties would have been had the conspiratory price not been granted. The lower court's opinion amply compiles authorities refuting Petitioners' contention that the test should be to ascertain what the plaintiff's position would have been had it too received the special "discriminatory" price. Respondents will not here reiterate those authorities. Had the court below held that the fact of a discriminatory price must be ignored altogether, it would indeed have been a novel holding of first impression, as is alleged on page 18 of the Petition; but the court did *not* so hold. Nor did the court hold or even intimate that such evidence could not be used in computing the amount of damage once the fact of damage has been shown. To the contrary, the Court of Appeals rightly held that if a wrongful act has occurred when a supplier has given one of several potential customers a discriminatory price, a plaintiff may not claim that it too should have received the improper price.

Applying this correct view of the law, the Court of Appeals' panel of Judges Clark, Goldberg, and Gee reviewed the entire, voluminous record and properly concluded that Petitioners had failed to establish their purely factual contention that they *would have* received the Government contract in question "but for" the alleged conspiracy. [8]

Petitioners' factual argument rests on an assumption that Land-Air, Inc., could not have received the contract

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[8] *Id.* The relevant holding is also reproduced at page 8 of the Petition.

in question. The opinion below amply explains why this assertion is unsupported by the record,[9] and Petitioners' offer of evidence *dehors* the record (the Rutherford Affidavit) is insufficient to establish that Land-Air's position in the bidding should be ignored. First, evidence outside the record is not properly before the Court, but even if the Rutherford Affidavit is considered, it is totally discredited and refuted by Respondents' conditional submission of controverting affidavits.[10] The affidavits appended hereto were conditionally offered by Respondents for consideration by the Court of Appeals in the event the court accepted the Rutherford Affidavit, which was tendered by Petitioners as "new evidence," and are also conditionally offered to this Honorable Court for consideration only in the event that the Rutherford Affidavit is accepted for any purpose.

As the Cornelius Affidavit [Attachment 1] indicates, Respondents have, since the date of the opinion of the Court of Appeals, further investigated the actual facts and circumstances surrounding the award of the contract here in question. As a result, two affidavits have been obtained from Edward Janowski, who was the Contracting Officer on this award. Although the affidavits and attached exhibits are largely self-explanatory, a few points deserve emphasis.

First, the Rutherford Affidavit unequivocally states that Land-Air had effected a withdrawal of its bid. This assertion is demonstrably false. Exhibit B to the first Janowski Affidavit [Attachment 2] evidences the "condition of bidding" that required bid withdrawls to be in writing and to be received before the bids are opened, a requirement of which Land-Air was specifically advised, before it bid, by Exhibit A to the same affidavit. This requirement is also in the record before the Court. *See* Printed Appendix in the Court of Appeals at 429. If Land-Air unilaterally at-

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[9] *Id.*

[10] *See* note 3, *supra*.

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tempted to withdraw its bid *after* the bid opening, as the Rutherford Affidavit alleges, such an attempt would have been ineffective because the Government's consent would have been required. It is inconceivable that any businessman who has committed his company to a contract obligation to the Government of nearly a million dollars' worth of business would not have taken care to obtain written evidence of the Government's consent when withdrawing from the commitment. Yet, the Rutherford Affidavit contains no documentary support, and the second Janowski Affidavit [Attachment 3] shows that the Government has no indication whatsoever in its files that Land-Air even tried to withdraw its bid, much less that it was permitted to do so. Exhibit C thereto shows that the Government was still corresponding with Land-Air on January 7, 1972, and Exhibit D shows that Land-Air was still being evaluated on December 15, 1971. Thus, no withdrawal occurred, and there is no indication a withdrawal was even attempted.

Second, the Rutherford Affidavit states that the reason no pre-award survey was done on Land-Air was because Land-Air had withdrawn its bid. This is also incorrect. As Exhibits A and B to the second Janowski Affidavit [Attachment 3] demonstrate, the only reason no survey was done was the mistaken misrouting of documents regarding Land-Air. [Because the handwritten portions of Exhibits A and B are difficult to read, typed transcripts are provided herewith as Attachment 4.] When the mistake was discovered, the pre-award survey was not ordered *because* the bids had already been evaluated and "at this point" it "looks like [Land-Air is] not actually low-bidder anyhow" [Ex. B, dated December 17, 1971].

The Robinson-Patman Act Question

Expressly pretermitting consideration of all the other points raised by Respondents in regard to the Robinson-

Patman Act issues,[11] the Court of Appeals founded its opinion on the narrow ground that "Universal and H/R were not competing for the same consumer dollar in their activities . . ."[12] Judge Clark's opinion sets forth complete justification under the law and the record for reaching this factual conclusion, and Respondents will not here expand upon that discussion except to point out that Petitioners' attempted reliance upon the *Bruce's Juices* case[13] was expressly considered and properly rejected by the Court of Appeals.[14]

Rule 19(1)(b) Considerations

Rule 19(1)(b) lists various indicia of when the Court's discretionary power to issue a certiorari should be exercised; none of those reasons are present here. There is no conflict among the circuits. There is no important question of law which has not been decided before by this Court or which should be decided. There is no conflict with the prior decisions of this Court. Lastly, the Court of Appeals did not depart in the least from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by a lower court.

Another reason why it would be inappropriate to issue a writ in this case is that the facts are unique and unlikely ever to arise again. By way of example, the Court of Appeals recognized that the goods here in question could be sold only to a single end-user — the military.[15] Thus, the issues here presented could arise again only where a given company is currently purchasing from a certain supplier and is reselling to the military, the Government solicits

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[11] Opinion below, 517 F.2d at 1066, Petitioners' Appendix at 6.

[12] *Id.*, 517 F.2d at 1068, Petitioners' Appendix at 9.

[13] American Can Co. v. Bruce's Juices, 187 F.2d 919 (5th Cir. 1951), cert. dismissed, 342 U.S. 875 (1951), modified at 190 F.2d 73 (5th Cir. 1951).

[14] *Id.*, 517 F.2d at 1067, n.17, Petitioners' Appendix at 17-18, n.17.

[15] *Id.*, 517 F.2d at 1061, n.1, Petitioners' Appendix at 2, n.1.

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new bids, and both the company and its competitors obtain price quotations from the same supplier. Moreover, it should not be overlooked that Petitioners' case was founded solely upon an alleged price discrimination, and the Robinson-Patman Act itself is currently being studied by the Executive and the Legislative branches with the possible goal of repealing the Act entirely. Highly placed officials of the Antitrust Division of the Department of Justice are urging repeal of the statute,[16] and both the Congress[17] and the White House[18] have begun hearings to determine whether the Act should continue to exist.

The issues in the present case are unlikely to recur and are too narrow and factual in nature to warrant review by this Court on certiorari. The only real questions turn on the particular facts of this case and are of interest only to the parties to it. In essence, Petitioners ask this Court to repeat the Court of Appeals' review of the lengthy trial record to see if it can find evidence to support Petitioners' factual allegations. This Court has long held that this is not a purpose to be served by the extraordinary writ of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). In the instant case, Petitioner raises questions entirely dependent upon the resolution of

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[16] *See, e.g.*, 723 A.T.R.R. A-4 (Testimony of Joe Sims, Special Assistant to the Head of the Antitrust Division, calling for abolishment of the Act, July 22, 1975); 723 A.T.R.R. A-20 Testimony of Joe Sims, suggesting that "complete repeal" of the Act would be "appealling," September 30, 1975); and 737 A.T.R.R. A-6 (Address by Jonathan C. Rose, Acting Deputy Assistant Attorney General, Antitrust Division, calling for "outright appeal," November 4, 1975).

[17] Congressional subcommittee hearings are reported at 738 A.T.R.R. A-3 (November 11, 1975), 739 A.T.R.R. A-19 (November 18, 1975), 740 A.T.R.R. A-3 (November 25, 1975), and 743 A.T.R.R. A-21 (December 16, 1975).

[18] Activities and hearings of the White House Domestic Council are reported at 740 A.T.R.R. A-3 (November 25, 1975), 742 A.T.R.R. A-20 (December 9, 1975), and 743 A.T.R.R. A-21 (December 16, 1975).

contested issues of unique fact. The Court of Appeals has already fulfilled the task of conducting that review and has correctly applied the unbroken line of authorities upon which it relied to reach its just result. Certiorari should be denied.

CONCLUSION

For the reasons set forth above, Respondents respectfully pray that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Original
(Signed) B.J.Bradshaw

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondents, a member in good standing of the bar of this Court, hereby certifies pursuant to Rule 33(1) of the Rules of the Supreme Court of the United States, that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari and three copies of the separately bound Appendix thereto have been served upon each party hereto by depositing same in a United States mail box, with first class postage prepaid, correctly addressed to their counsel of record at their post office addresses.

Dated: February 23, 1976.

Original
(Signed) B.J.Bradshaw

.....

BUREN JACKSON BRADSHAW

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APPENDIX TO

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FIDELITY PRINTING COMPANY, HOUSTON

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In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2246

M. C. MANUFACTURING COMPANY, INC., ET AL

V.

TEXAS FOUNDRIES, INC., ET AL

THE STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, personally appeared James R. Cornelius, Jr., of Lufkin, Texas, who being duly sworn, deposes and says:

I am one of the attorneys of record for the Defendants-Appellants in the above-entitled cause. The facts stated in this affidavit are, within my personal knowledge, true and correct.

When we received instructions from the Clerk to reply to point 1 of Plaintiffs'-Appellees' Motion for Rehearing, which contained the hearsay affidavit asserting that Land-Air, Inc., had withdrawn its bid, Mr. Mark Miller and I went to the Arsenal at Rock Island, Illinois (formerly at Joliet) and contacted the Contracting Officer who signed Contract DAAA-09-72-C-0208, Mr. Edward Janowski. He pulled and in our presence reviewed the Contract file and found that it contained no hint of an effort to withdraw Land-Air's bid, and he made an affidavit to that effect which is attached hereto. He also made an affidavit showing that all bidders were warned that any offer they make may become a binding contract simply by acceptance, and that there are strict regulations regarding withdrawal of bids. This affidavit is also attached.

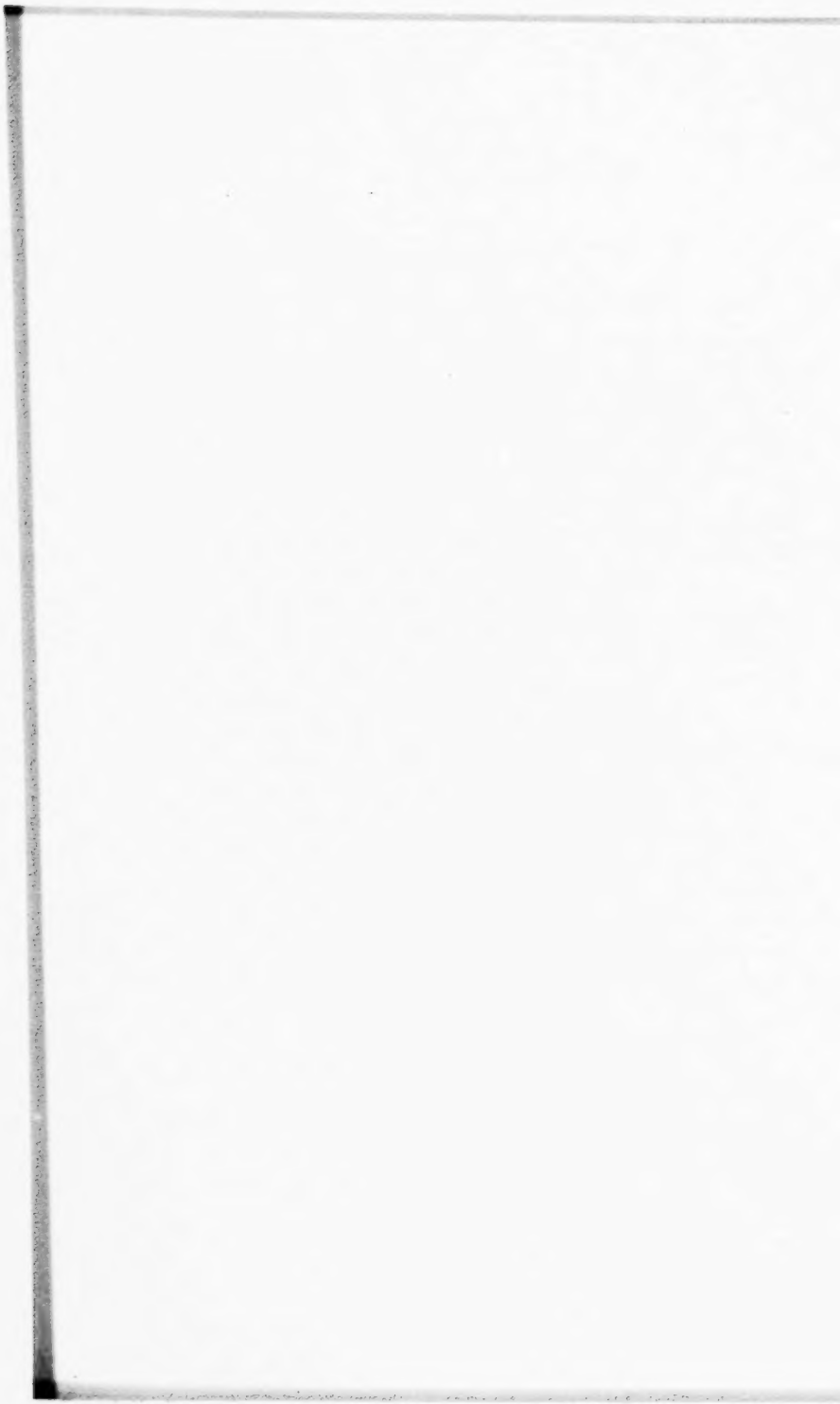
James R. Cornelius, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME this 7th day of October, 1975.

Notary Public in and for
Harris County, T e x a s.

CHARLOTTE CARR
Notary Public in and for Harris County, Texas

Attachment 1
1 of 1



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THE STATE OF ILLINOIS I
COUNTY OF Rock Island I

BEFORE ME, the undersigned authority, on this day personally appeared EDWARD JANOWSKI, who, being by me first duly sworn, upon his oath states that he is over the age of eighteen years and in no way incapacitated to make this Affidavit, and that the following facts are true and correct:

My name is Edward Janowski. I was a GS-11-7, 0-3 ~~am the~~ Contracting Officer employed by the United States Army Munitions Command, sometimes referred to as MUCOM. I was formerly stationed at Joliet, Illinois, and am now stationed at Rock Island, Illinois. I was the Contracting Officer who signed the contract on behalf of the United States Government with H/R Products, Inc., known as No. DAAA -09-72-C-0208.

This contract resulted from an advertised solicitation for bids, being No. DAAA-09-72-B-0008 dated October 27, 1971.

The solicitation DAAA-09-72-B-0008 sent to all bidders contained a caution sheet, a true and accurate copy of which is attached hereto, and marked Exhibit "A". It also contained "Solicitation Instructions and Conditions" known as Form 33 A, in two pages, containing 19 numbered paragraphs, and Exhibit "B" which is attached hereto and made a part hereof is an exact copy thereof.

Edward Janowski

SWORN TO AND SUBSCRIBED BEFORE ME by the said Edward Janowski this 2nd day of October, 1975, to certify which witness my hand and seal of office.

Notary Public in and for
Rock Island County, Illinois

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UNITED STATES ARMY
AMMUNITION PROCUREMENT AND SUPPLY AGENCY
JOLIET, ILLINOIS 60436

OFFERORS INFORMATION CHECK LIST

CAUTION! THE OFFER YOU SIGN MAY BECOME A BINDING CONTRACT. PLEASE CHECK THE FOLLOWING IMPORTANT POINTS BEFORE SIGNING YOUR OFFER. THIS CHECK LIST IS FORWARDED FOR YOUR CONVENIENCE AND NEED NOT BE RETURNED TO THE GOVERNMENT WITH YOUR OFFER.

☐ **DELIVERIES:**

CAN YOU FULFILL THE PROMISED SCHEDULES?
HAVE YOU CONSIDERED LEAD TIME FOR ALL RAW MATERIALS AND PURCHASED PARTS?
HAVE YOU READ THE DEFAULT CLAUSE OF THE GENERAL PROVISIONS?

☐ **PRICES:**

HAVE YOU CHECKED YOUR COMPUTATIONS?

☐ **MODIFICATION OR WITHDRAWAL OF OFFER:**

HAVE YOU READ PARAGRAPHS 7 AND 8 OF STANDARD FORM 33-A RELATIVE TO MODIFICATION OR WITHDRAWAL OF OFFERS?

☐ **SPECIFICATIONS:**

DO THE ITEMS OFFERED MEET ALL SPECIFICATIONS AND SPECIFICATION REQUIREMENTS?
HAVE YOU LISTED ANY DIFFERENCES?
DO YOU HAVE THE CURRENT REQUIRED DRAWINGS AND SPECIFICATIONS?

☐ **INSPECTION REQUIREMENTS:**

HAVE YOU PROVIDED FOR NECESSARY TEST EQUIPMENT?
HAVE YOU PLANNED FOR A GOOD INSPECTION SYSTEM?

☐ **PACKAGING:**

HAVE YOU READ THE PRESERVATION, PACKAGING, PACKING AND MARKING SPECIFICATIONS?
HAVE YOU ADEQUATE FACILITIES TO COMPLY WITH PACKAGING SPECIFICATIONS?
HAVE YOU MADE COMMITMENTS TO OBTAIN ADEQUATE FACILITIES?

☐ **POSTAGE:**

HAVE YOU PLACED SUFFICIENT POSTAGE ON THE ENVELOPE CONTAINING YOUR OFFER?
DO YOU REALIZE THAT IT CANNOT BE ACCEPTED IF THERE IS "POSTAGE DUE"?
DO YOU REALIZE THAT OFFERS RECEIVED LATE BECAUSE OF RETURN FOR POSTAGE CANNOT BE CONSIDERED?

☐ **SUBMISSION OF OFFER:**

HAVE YOU SIGNED THE ORIGINAL AND TWO COPIES OF YOUR OFFER?
ARE YOU AWARE THAT THE LABEL ENCLOSED IS TO BE USED FOR READY IDENTIFICATION PURPOSES ON THE ENVELOPE CONTAINING YOUR OFFER?

☐ **NO OFFER:**

IF YOU DO NOT INTEND TO SUBMIT AN OFFER, HAVE YOU FOLLOWED THE INSTRUCTIONS OF PARAGRAPH 6, STANDARD FORM 33-A?
ARE YOU AWARE THAT THE LABEL ENCLOSED SHOULD NOT BE USED IF A "NO OFFER" IS TO BE SUBMITTED?
DO YOU REALIZE THAT CONSISTENT NON-RESPONSE TO SOLICITATIONS MAY RESULT IN REMOVAL FROM THE AMMUNITION PROCUREMENT AND SUPPLY AGENCY'S MAILING LIST?

SMUAP-AP 62LA (REV AUG 67) — AAPSA - JOLIET, ILL.

Attachment 2
2 of 4

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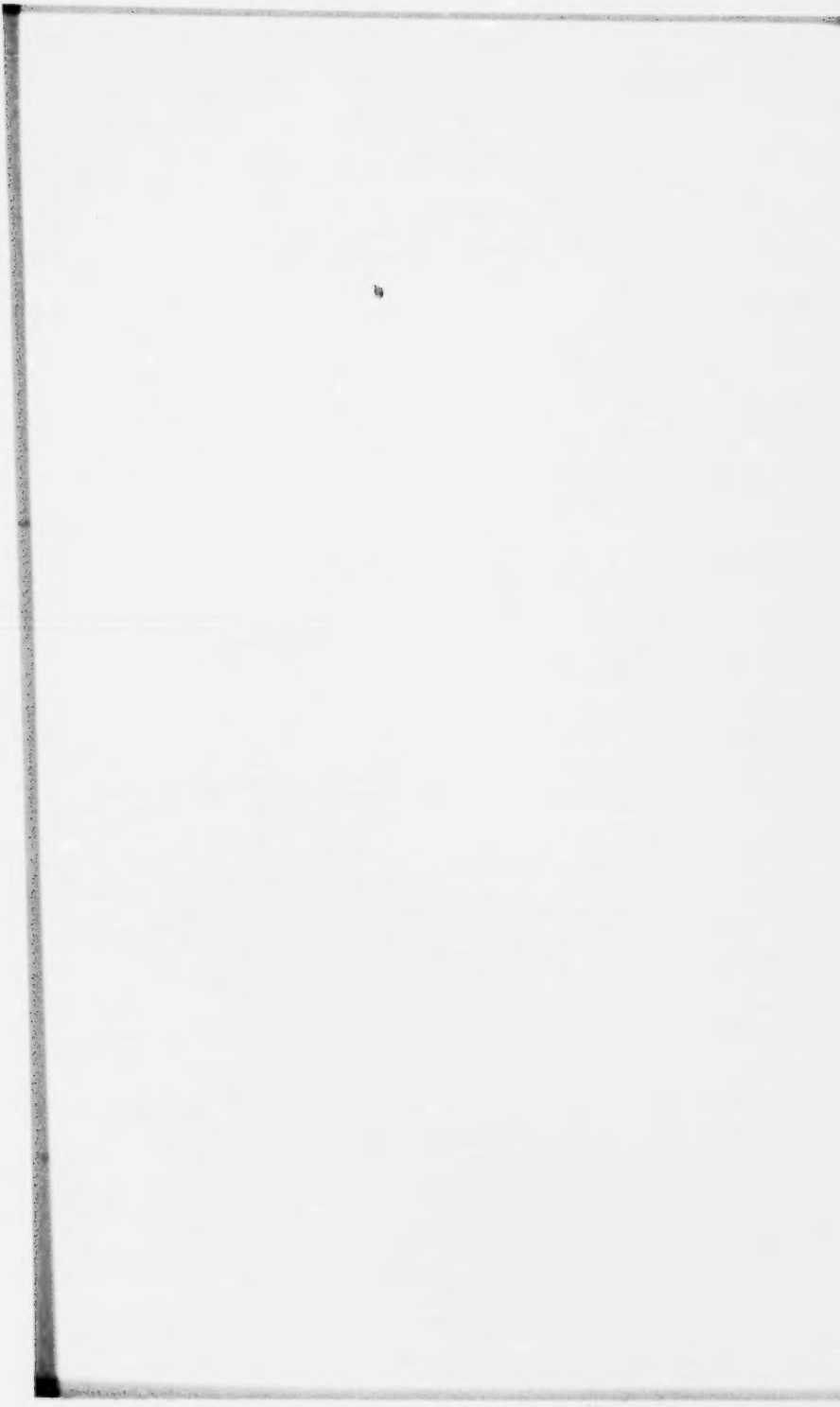

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SOLICITATION INSTRUCTIONS AND CONDITIONS

1. DEFINITIONS.
As used herein:
(a) The term "solicitation" means Invitation for Bids (IFB) where the procurement is advertised, and Request for Proposal (RFP) where the procurement is negotiated.
(b) The term "offer" means bid where the procurement is advertised, and proposal where the procurement is negotiated.
(c) For purposes of this solicitation and Block 2 of Standard Form 33, the term "advertised" includes Small Business Restricted Advertising and other types of restricted advertising.

2. PREPARATION OF OFFERS.
(a) Offerors are expected to examine the drawings, specifications, Schedule, and all instructions. Failure to do so will be at the offeror's risk.
(b) Each offeror shall furnish the information required by the solicitation. The offeror shall sign the solicitation and print or type his name on the Schedule and each Continuation Sheet thereof on which he makes an entry. Erasures or other changes must be initialed by the person signing the offer. Offers signed by an agent are to be accompanied by evidence of his authority unless such evidence has been previously furnished to the issuing office.
(c) Unit price for each unit offered shall be shown and such price shall include packing unless otherwise specified. A total shall be entered in the Amount column of the Schedule for each item offered. In case of discrepancy between a unit price and extended price, the unit price will be presumed to be correct, subject, however, to correction to the same extent and in the same manner as any other mistake.
(d) Offers for supplies or services other than those specified will not be considered unless authorized by the solicitation.
(e) Offeror must state a definite time for delivery of supplies or for performance of services unless otherwise specified in the solicitation.
(f) Time, if stated as a number of days, will include Saturdays, Sundays and holidays.
(g) Code boxes are for Government use only.

3. EXPLANATION TO OFFERORS. Any explanation desired by an offeror regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach offerors before the submission of their offers. Oral explanations or instructions given before the award of the contract will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished to all prospective offerors as an amendment of the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed offerors.

4. ACKNOWLEDGMENT OF AMENDMENTS TO SOLICITATIONS. Receipt of an amendment to a solicitation by an offeror must be acknowledged (a) by signing and returning the amendment, (b) on the reverse of Standard Form 33, or (c) by letter or telegram. Such acknowledgment must be received prior to the hour and date specified for receipt of offers.

5. SUBMISSION OF OFFERS.
(a) Offers and modifications thereof shall be enclosed in sealed envelopes and addressed to the office specified in the solicitation. The offeror shall show the hour and date specified in the solicitation for receipt, the solicitation number, and the name and address of the offeror on the face of the envelope.
(b) Telegraphic offers will not be considered unless authorized by the solicitation; however, offers may be modified by telegraphic notice, provided such notice is received prior to the hour and date specified for receipt. (However, see par. 8.)
(c) Samples of items, when required, must be submitted within the time specified, and unless otherwise specified by the Government, at no expense to the Government. If not destroyed by testing, samples will be returned at offeror's request and expense, unless otherwise specified by the solicitation.

6. FAILURE TO SUBMIT OFFER. If no offer is to be submitted, do not return the solicitation unless otherwise specified. A letter or postcard should be sent to the issuing office advising whether future solicitations for the type of supplies or services covered by this solicitation are desired. Failure of the recipient to offer, or to notify the issuing office that future solicitations are desired, may result in removal of the name of such recipient from the mailing list for the type of supplies or services covered by the solicitation.

Entitlement 2

7. MODIFICATION OR WITHDRAWAL OF OFFERS.
(a) If this solicitation is advertised, offers may be modified or withdrawn by written or telegraphic notice received prior to the exact hour and date specified for receipt of offers. An offer also may be withdrawn in person by an offeror or his authorized representative, provided his identity is made known and he signs a receipt for the offer, but only if the withdrawal is made prior to the exact hour and date set for receipt of offers. (However, see par. 8.)

(b) If this solicitation is negotiated, offers may be modified (subject to par. 8, when applicable) or withdrawn by written or telegraphic notice received at any time prior to award. Offers may be withdrawn in person by an offeror or his authorized representative, provided his identity is made known and he signs a receipt for the offer prior to award.

8. LATE OFFERS AND MODIFICATIONS OR WITHDRAWALS. (This paragraph applies to all advertised solicitations. In the case of Department of Defense negotiated solicitations, it shall also apply to late offers and modifications (other than the normal revisions of offers by selected offerors during the usual conduct of negotiations with such offerors) but not to withdrawals of offers. Unless otherwise provided, this paragraph does not apply to negotiated solicitations issued by civilian agencies.)

(a) Offers and modifications of offers (or withdrawals thereof, if this solicitation is advertised) received at the office designated in the solicitation after the exact hour and date specified for receipt will not be considered unless: (1) they are received before award is made; and either (2) they are sent by registered mail, or by certified mail for which an official dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained and it is determined by the Government that the late receipt was due solely to delay in the mails for which the offeror was not responsible; or (3) if submitted by mail (or by telegram if authorized) it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; provided, that timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt (if readily available) within the control of such installation or of the post office serving it. However, a modification of an offer which makes the terms of an otherwise successful offer more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

(b) Offerors using certified mail are cautioned to obtain a Receipt for Certified Mail showing a legible, dated postmark and to retain such receipt against the chance that it will be required as evidence that a late offer was timely mailed.

(c) The time of mailing of late offers submitted by registered or certified mail shall be deemed to be the last minute of the date shown in the postmark on the registered mail receipt or registered mail wrapper or on the Receipt for Certified Mail unless the offeror furnishes evidence from the post office station of mailing which establishes an earlier time. In the case of certified mail, the only acceptable evidence is as follows: (1) where the Receipt for Certified Mail identifies the post office station of mailing, evidence furnished by the offeror which establishes that the business day of that station ended at an earlier time, in which case the time of mailing shall be deemed to be the last minute of the business day of that station; or (2) an entry in ink on the Receipt for Certified Mail showing the time of mailing and the initials of the postal employee receiving the item and making the entry, with appropriate written verification of such entry from the post office station of mailing, in which case the time of mailing shall be the time shown in the entry. If the postmark on the original Receipt for Certified Mail does not show a date, the offer shall not be considered.

9. DISCOUNTS. (a) Notwithstanding the fact that a blank is provided for a ten (10) day discount, prompt payment discounts offered for payment within less than twenty (20) calendar days will not be considered in evaluating offers for award, unless otherwise specified in the solicitation. However, offered discounts of less than 20 days will be taken if payment is made within the discount period, even though not considered in the evaluation of offers.

(b) In connection with any discount offered, time will be computed from date of delivery of the supplies to carrier when delivery and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when delivery and

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acceptance are at either of those points, or from the date correct invoice or voucher is received in the office specified by the Government, if the latter date is later than date of delivery. Payment is deemed to be made for the purpose of earning the discount on the date of mailing of the Government check.

10. AWARD OF CONTRACT. (a) The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered.

(b) The Government reserves the right to reject any or all offers and to waive informalities and minor irregularities in offers received.

(c) The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, OFFERS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY OFFERED AT THE UNIT PRICES OFFERED UNLESS THE OFFEROR SPECIFIES OTHERWISE IN HIS OFFER.

(d) A written award (or Acceptance of Offer) mailed (or otherwise furnished) to the successful offeror within the time for acceptance specified in the offer shall be deemed to result in a binding contract without further action by either party.

The following paragraphs (e) through (h) apply only to negotiated solicitations:

(e) The Government may accept within the time specified therein, any offer (or part thereof, as provided in (c) above), whether or not there are negotiations subsequent to its receipt, unless the offer is withdrawn by written notice received by the Government prior to award. If subsequent negotiations are conducted, they shall not constitute a rejection or counter offer on the part of the Government.

(f) The right is reserved to accept other than the lowest offer and to reject any or all offers.

(g) The Government may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government.

(h) Any financial data submitted with any offer hereunder or any representation concerning facilities or financing will not form a part of any resulting contract; provided, however, that if the resulting contract contains a clause providing for price reduction for defective cost or pricing data, the contract price will be subject to reduction if cost or pricing data furnished hereunder is incomplete, inaccurate, or not current.

11. GOVERNMENT-FURNISHED PROPERTY. No material, labor, or facilities will be furnished by the Government unless otherwise provided for in the solicitation.

12. LABOR INFORMATION. General information regarding the requirements of the Walsh-Healey Public Contracts Act (41 U.S.C. 35–45), the Contract Work Hours Standards Act (40 U.S.C. 327–330), and the Service Contract Act of 1965 (41 U.S.C. 351–357) may be obtained from the Department of Labor, Washington, D.C. 20210, or from any regional office of that agency. Requests for information should include the solicitation number, the name and address of the issuing agency, and a description of the supplies or services.

13. BILLING INVOICES. Invoices shall be prepared and submitted in quadruplicate (one copy shall be marked "original") unless otherwise specified. Invoices shall contain the following information: Contract and order number (if any), item numbers, description of supplies or services, sizes, quantities, unit prices, and extended totals. Bill of lading number and weight of shipment will be shown for shipments made on Government bills of lading.

14. SMALL BUSINESS CONCERN. A small business concern for the purpose of Government procurement is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is submitting offers on Government contracts, and can further qualify under the criteria concerning number of employees, average annual receipts, or other criteria, as prescribed by the Small Business Administration. (See Code of Federal Regulations, Title 13, Part 121, as amended, which contains detailed industry definitions and related procedures.)

15. CONTINGENT FEE. If the offeror, by checking the appropriate box provided therefor, has represented that he has employed or retained a company or person (other than a full-time bona fide employee working solely for the offeror) to solicit or secure this contract, or that he has paid or agreed to pay any fee, commission, percentage, or brokerage fee to any company or person contingent upon or resulting from the award of this contract, he shall furnish, in duplicate, a completed Standard Form 119, Contractor's Statement of Contingent or Other Fees. If offeror has previously furnished a completed Standard Form 119 to the office issuing this solicitation, he may accompany his offer with a signed statement (a) indicating when such completed form was previously furnished, (b) identifying by number the previous solicitation or contract, if any, in connection with which such form was submitted, and (c) representing that the statement in such form is applicable to this offer.

16. PARENT COMPANY. A parent company for the purpose of this offer is a company which either owns or controls the activities and basic business policies of the offeror. To own another company means the parent company must own at least a majority (more than 50 percent) of the voting rights in that company. To control another company, such ownership is not required; if another company is able to formulate, determine, or veto basic business policy decisions of the offeror, such other company is considered the parent company of the offeror. This control may be exercised through the use of dominant minority voting rights, use of proxy voting, contractual arrangements, or otherwise.

17. EMPLOYER'S IDENTIFICATION NUMBER. (Applicable only to advertised solicitations.) The offeror shall insert in the applicable space on the offer form, if he has no parent company, his own Employer's Identification Number (E.I. No.) (Federal Social Security Number used on Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941), or, if he has a parent company, the Employer's Identification Number of his parent company.

18. CERTIFICATION OF INDEPENDENT PRICE DETERMINATION. (a) This certification on the offer form is not applicable to a foreign offeror submitting an offer for a contract which requires performance or delivery outside the United States, its possessions, and Puerto Rico.

(b) An offer will not be considered for award where (a)(1), (a)(3), or (b) of the certification has been deleted or modified. Where (a)(2) of the certification has been deleted or modified, the offer will not be considered for award unless the offeror furnishes with the offer a signed statement which sets forth in detail the circumstances of the disclosure and the head of the agency, or his designee, determines that such disclosure was not made for the purpose of restricting competition.

19. ORDER OF PRECEDENCE. In the event of an inconsistency between provisions of this solicitation, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule; (b) Solicitation Instructions and Conditions; (c) General Provisions; (d) other provisions of the contract, whether incorporated by reference or otherwise; and (e) the specifications.

U.S. GOVERNMENT PRINTING OFFICE

Attachment 2
Exhibit E 4 of 4

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THE STATE OF ILLINOIS

COUNTY OF Rock Island

BEFORE ME, the undersigned authority, on this day personally appeared EDWARD JANOWSKI, who, being by me first duly sworn, upon his oath states that he is over the age of eighteen years and in no way incapacitated to make this Affidavit, and that the following facts are true and correct:

My name is Edward Janowski. I was a Contracting Officer employed by the United States Army Munitions Command, sometimes referred to as MUCOM. I was formerly stationed at Joliet, Illinois, and am now stationed at Rock Island, Illinois. I was the Contracting Officer who signed the contract on behalf of the United States Government with H/R Products, Inc., known as No. DAAA-09-72-C-0208.

I have searched the file on H/R Products, Inc. on Contract DAAA-09-72-C-0208 and find that it does not contain any written statement, memorandums, letter, telegram, or indication of any kind to the effect that Land-Air, Inc. requested to withdraw its bid.

The attached Exhibits A, B, C and D are true copies of documents found in said file. Exhibit A is a telephone or verbal conversation record dated 7 December 1971. Exhibit B, is a telephone or verbal conversation record dated 17 December 1971. Exhibit C is a letter I wrote Land-Air, Inc. 7 Jan, 1972 informing them that H/R Products received the award. I would not have written this letter if I knew Land-Air, Inc. had withdrawn its bid. Exhibit D is a Price Evaluation Report.

Edward Janowski

SWORN TO AND SUBSCRIBED BEFORE ME by the said Edward Janowski this 9 day of October, 1975, to certify which witness my hand and seal of office.

Notary Public in and for Rock Island County, Illinois

Attachment 3
1 of 3

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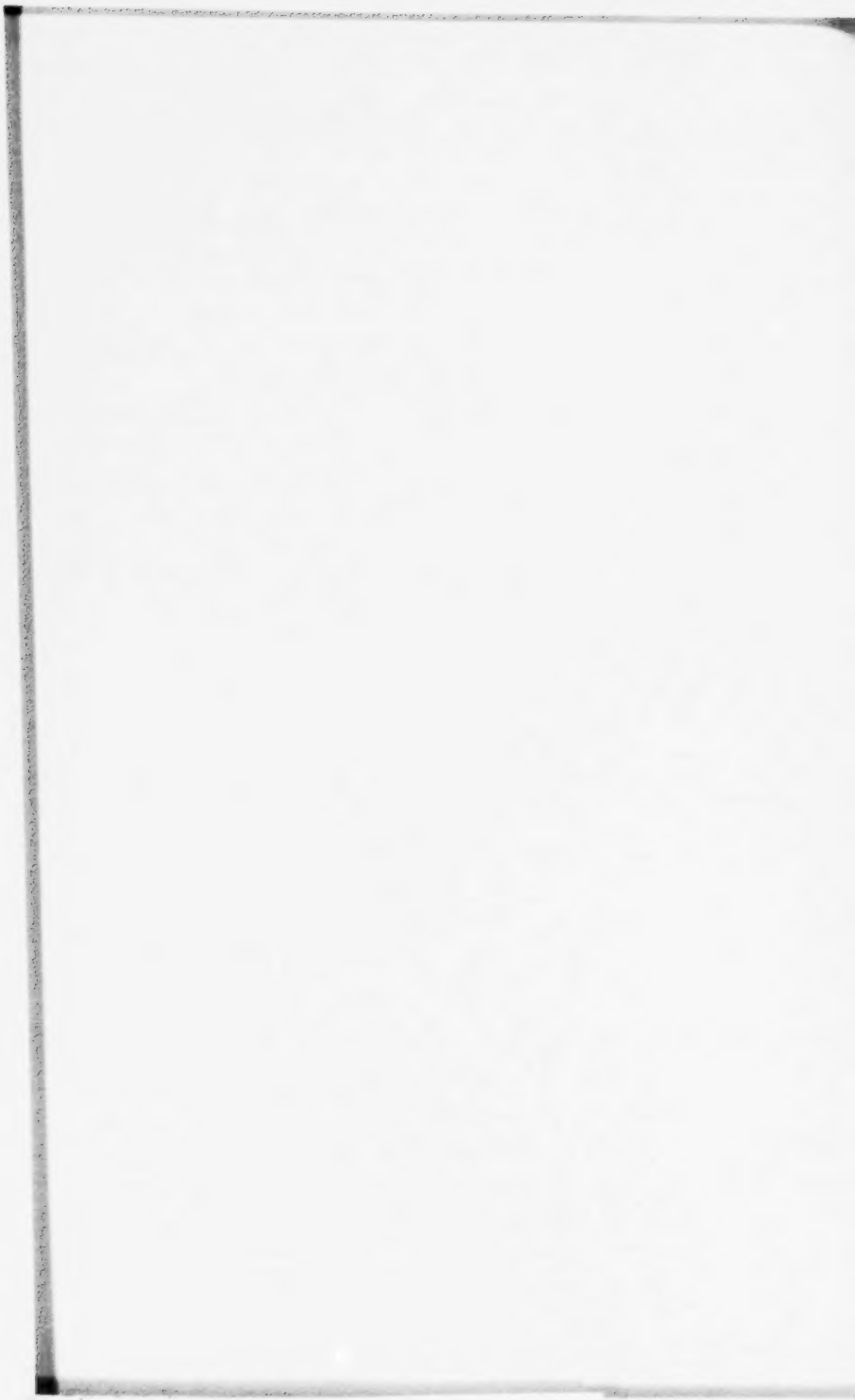

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TELEPHONE OR VERBAL CONVERSATION RECORD

For use of this form, see AR 340-15; the proponent agency is The Adjutant General's Office.

DATE: 7 Dec 71

SUBJECT OF CONVERSATION: Pre-Award Surveys

INCOMING CALL

PERSON CALLING	ADDRESS	PHONE NUMBER AND EXTENSION

PERSON CALLED	OFFICE	PHONE NUMBER AND EXTENSION

OUTGOING CALL

PERSON CALLING	OFFICE	PHONE NUMBER AND EXTENSION
Jo Taylor	PCGC	10:00 a.m. 2534

PERSON CALLED	ADDRESS	PHONE NUMBER AND EXTENSION
Pre-award monitors	DCASR Dallas	940-1421

SUMMARY OF CONVERSATION

Requested advance work be done on Pre-award for Universal + Land Air. Informed him 1524 was forthcoming and due needed it NLT 20 Dec. 71. He indicated it would be ready.

Later

Called back to inform pre-award monitor that Land-Air had been declared non-responsive. Told him to drop Land-Air pre award.

Exhibit A

DA FORM 1 APR 66 751 REPLACES EDITION OF 1 FEB 58 WHICH WILL BE USED.

Attachment 3
2 of 8

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TELEPHONE OR VERBAL CONVERSATION RECORD
(AR 340-15)

DATE: 17 Dec 71

SUBJECT OF CONVERSATION: Pre-Award Survey, Land-Air, Inc.

INCOMING CALL

PERSON CALLING	ADDRESS	PHONE NUMBER AND EXTENSION

PERSON CALLED	OFFICE	PHONE NUMBER AND EXTENSION

OUTGOING CALL

PERSON CALLING	OFFICE	PHONE NUMBER AND EXTENSION
[illegible]	PCEC	2574

PERSON CALLED	ADDRESS	PHONE NUMBER AND EXTENSION
Mr. Turner, Pre-Award Monitor	Northern Monitor Region, Seattle, Wash.	940-1491

SUMMARY OF CONVERSATION:

Reference request for advance action on Pre-Award Land-Air, Inc. & recall on dropping action on Land Air survey due to non-responsiveness, 7 Dec. 71

advised that amendments were acknowledged but inadvertently placed with "not bids replies". That they were then responsive but preliminary analysis indicates Land-Air, Inc. skills not be the lowest evaluated bidder.

Want the information given so we would get out that "Land-Air, Inc was non-responsive,

Mr. Turner assured me that no word regarding non-responsiveness of Land-Air would get out of their office. ~~Capt~~ advised him that we will not institute pre-award action at this point however our preliminary analysis looks like they are not the low evaluated bidder, however, [illegible] Exhibit B

DA FORM 1 APR 66 751 REPLACES EDITION OF 1 FEB 58 WHICH WILL BE USED.

Attachment 3
3 of 8

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AMSMU-PP-PCGC

07 JAN 72

Land Air, Inc.
5801 E. Rosedale
Ft Worth, Texas 76112

Gentlemen:

Reference is made to your bid submitted in response to Invitation for Bid DAAA09-72-B-0003.

The following information regarding contract award resulting from the above referenced invitation for Bid is furnished for your information:

a. Number of prospective contractors solicited: 159

b. Number of bids received: 16

c. Bidder receiving award: H/R Products Inc.
Indianapolis, Indiana

d. Item: Lifting Plug, Type G

e. Quantity: 1,084,800

f. Price and Shipping Method: $.476 FOB ORIGIN

Your interest in defense contracting is appreciated.

Sincerely,

EDWARD JANOWSKI
Procuring Contracting Officer

Exhibit C

Attachment 3
4 of 8

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For use of this form, see AR 340-15; the proponent agency is The Adjutant General's Office.

REFERENCE OR OFFICE SYMBOL	SUBJECT
AMSMU-PP-PCAC	Price Evaluation Report, Plug, Lifting, Type G f/155MM Projectile, IFB DAAA09-72-B-0008 1,984,800 each

TO AMSMU-PP-PCGC FROM AMSMU-PP-PCAC DATE 15 Dec 71 CMT 1
Mr. Fox/ps/2798

1. General Information:

a. This analysis was made in accordance with the provisions of ASPR 2-103(iv). ASPR 1-706, PPM 2-4 in reply to your request dated 6 December 1971.

b. IFB DAAA09-72-B-0008 is a 100% small business set aside procurement of 1,984,800 each Lifting Plugs, Type G for 155MM Projectile. The solicitation provides for an option quantity of 50% of the basic quantity.

c. The solicitation package provides for an alternate A quantity of 1,984,800 units and an alternate B quantity of 992,400. The bid package states that bids may be submitted on alternate A quantity or alternate B quantity or any quantity cited herein individually. The package further indicates that awards will be made to the lowest bidder or bidders. The final criterion is that in the event that two awards are made for the alternate B quantities, the total cost must be lower than the total cost for one award on the alternate A quantity.

d. Shown below are the monthly schedules for both alternate A and alternate B quantities:

Feb 72	250,000	125,000
Mar 72	250,000	125,000
Apr 72	250,000	125,000
May 72	200,000	100,000
Jun 72	200,000	100,000
Jul 72	200,000	100,000
Aug 72	200,000	100,000
Sep 72	200,000	100,000
Oct 72	200,000	100,000
Nov 72	34,800	17,400

e. Our examination was limited to the following four bids which you submitted to us for evaluation. These were the lowest bids submitted and are considered to be the only ones that should be used in calculating the least expensive pattern of awards:

AMS Manufacturing Inc.
H/R Products
Land Air Inc.
Universal Automatic Machine Co.

Exhibit D

FOR OFFICIAL USE ONLY

Protective Markings may be removed upon contract finalization or withdrawal of requirement.

DA FORM 1 FEB 62 2496 REPLACES DD FORM 96, EXISTING SUPPLIES OF WHICH WILL BE ISSUED AND USED UNTIL 1 FEB 63 UNLESS SOONER EXHAUSTED. ☆ GPO 1970-389-410

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AMSMI-PP-PCAC
SUBJECT: Price Evaluation Report, Plug, Lifting, Type G f/155MM, Projectile, IFB DAAA09-72-B-0008, 1,984,800 each

2. Purpose:

The purpose of this analysis is to determine if an award can be made for 1,984,800 each Type G Lifting Plug, by utilizing price analysis techniques.

3. Scope:

a. In accordance with the terms and conditions set forth in IFB DAAA09-72-B-0008, the following criteria was used for our evaluation of the bids received.

(1) Item cost bid

(2) Transportation. (Since destinations are unknown, transportation was not considered as an evaluation factor).

(3) Discount for prompt payment.

(4) Price reduction for waiver of first article sample requirement. (Only Universal Automatic Machine Incorporated offered a price reduction for waiver of first article sample requirement. You informed us that they are eligible for waiver, therefore, we used $.0005 as a reductive evaluation factor).

(5) Option Quantity Evaluation. The solicitation provides for the following methods of option evaluation.

(a) If the Government elects to exercise an option simultaneously with award, bid or proposals will be evaluated for purposes of award on the basis of the total price for the basic quantity and the option quantity exercised with award.

(b) Bids and proposals will be evaluated for purposes of award by adding the total price for all option quantities to the total price for the basic quantity. Evaluation of the options will not obligate the Government to exercise the option or options. Any bid or proposal which is materially unbalanced as to prices for basic and option quantities may be rejected as non responsive.

Encl 1 D

FOR OFFICIAL USE ONLY

AMSMU-PP-PCAC
SUBJECT: Price Evaluation Report, Plug, Lifting, Type G f/155MM, Projectile, IFB DAAA09-72-B-0008, 1,984,800 each

(c) We felt that there was an inconsistency in the solicitation package in that it contained two separate clauses for option evaluation. Accordingly we solicited the aid of Mr. John Softcheck, Chief Legal Counsel. We were advised to evaluate the package by three methods. First, by determining the total cost for the least expensive pattern of awards by utilizing basic quantities only. Second, by determining the total cost for the least expensive pattern of awards by utilizing basic quantities and simultaneous option quantities if the simultaneous option quantities were less than the total option quantities. Finally, by determining the total cost for the least expensive pattern of awards by using basic quantities plus total option quantities. Mr. Softcheck is of the opinion that if all three methods lead to the same conclusion in the award pattern then the inconsistency in the package is not pertinent.

(d) You verbally told us that there will be no simultaneous option exercise. Accordingly, in our opinion, this eliminates case two above. Therefore, we addressed our evaluation to cases one and three above.

(e) The results of our evaluation show that in both cases it is less expensive to award the basic quantity of 1,984,800 Type G Lifting Plugs to H/R Products. Accordingly, in this case we have concluded that the inconsistency in the option clauses used in the solicitation package is not pertinent.

(6) Government Furnished Property. (None of the four bidders used in our evaluation indicated in the solicitation package that they would use Government Property that might be in their possession for the performance of this effort. Further, the cognizant Contract Specialist indicated that no additional Government property would be offered. Accordingly, GFP was not used as an evaluating factor).

b. Our evaluation includes the comparison of total evaluated prices and total costs as shown on Exhibits A through D attached. Further, we have shown below a listing of recent procurements for comparative purposes. Finally, we show the bid prices received on this solicitation for comparison purposes.

3 Exhibit D

FOR OFFICIAL USE ONLY

AMSMU-PP-PCAC
SUBJECT: Price Evaluation Report, Plug, Lifting, Type G f/155MM, Projectile, IFB DAAA09-72-B-0008, 1,984,800 each

Contractor	Contract/ Solicitation	Quantity	Maximum Monthly Rate	Unit Price
Universal Automatic Machine Co.	72-C-0133	732,040	200,000	$.4938
Universal Automatic Machine Co.	70-C-0419	172,100	200,000	.4933
H/R Products	70-C-0344	204,095	204,095	.548
Land Air Inc.	70-C-0446	130,000	130,000	.579
A.M.S. Manufacturing Inc.	72-B-0008	1,984,800	250,000	.518
H/R Products, Inc.	72-B-0008	1,984,800	250,000	.476
Land Air, Inc.	72-B-0008	1,984,800	250,000	.488
Universal Automatic Machine Co.	72-B-0008	1,984,800	250,000	.4928
H/R Products, Inc.	72-B-0008	992,400	125,000	.485
Land Air, Inc.	72-B-0008	992,400	125,000	.488
Universal Automatic Machine Co.	72-B-0008	992,400	125,000	.4928

c. Based on our examination of bid prices received, and historical prices, we consider that competition is adequate.

4. Conclusion:

a. Based on adequate competition, coupled with favorable price comparisons, we recommend that the following firm fixed price award be placed:

Contractor	Item	Quantity	Price	F.O.B.
H/R Products Inc.	Lifting Plug for 155MM, Type G	1,984,800	$.476	Orig Mtr.

b. It is noted that H/R Products offered a discount for prompt payment of 1/2 of 1%.

c. The above recommendation is subject to H/R Products receipt of a favorable pre award survey.

d. Option Quantity

The option price of $.473 is considered acceptable for inclusion in the contract. However, it is suggested that the tests of reasonableness prescribed by ASPR 1-1505 be accomplished prior to the award of option quantities.

Farrell R. Fox Jr.

4 Incl
Exhibits A through D

FARRELL R. FOX, Jr.
Contract Price Analyst

APPROVED: Michael A. Davies

MICHAEL A. DAVIES
Chief, Contr. Price and Cost Anal Sec.

FOR OFFICIAL USE ONLY

Typed verbatim copy of handwritten portion of Exhibit A

7 Dec. 71

Pre-Award Survey

Jo Taylor	PCGC	10:00 a.m. 2534
Pre-award monitor	DCHSR, Dallas	940-1421

Requested advance work be done on Pre-award for Universal & Land Air. Informed him 1524 was forthcoming and we needed it NLT 20 Dec. 71. He indicated it would be ready.

Later

Called back to inform pre-award monitor that Land-Air had been declared non-responsive. Told him to drop Land-Airs pre award.

Exhibit A

Attachment 4
1 of 2

Typed verbatim copy of handwritten portion of Exhibit B

17 Dec. 71

Pre-Award Survey/Land-Air, Inc.

L. Papineau PCGC 2534

Mr. Turner, pre award monitor
Pre-Award Monitor - DCASR, Dallas, 940-1421

Reference request for advance action on Pre-Award Land-Air, Inc. & recall on dropping action on Land-Air Survey due to non-responsiveness, 7 Dec. 71 advise that amendments were acknowledged but inadvertently placed with "no bid replies". That they were then responsive but preliminary analysis indicates Land-Air, Inc. will not be the lowest evaluated bidder.

Want this information given so no word gets out that "Land-Air, Inc. was non-responsive.

Mr. Turner assured me that no award regarding non-responsiveness of Land-Air would get out of their office. Advised him that we will not institute pre-award action at this point however since preliminary analysis looks like they are not actually low bidder anyhow.

Exhibit B

Attachment 4
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